THE

ADVANTAGES

OF

Settling Disputes

BY

ARBITRATION.

AT VINDICTA BONUM VITA JUCUNDIUS IPSA,
NEMPE HOC INDOCTI.—— JUV.

DISCITE JUSTITIAM MONITI.——VIRGIL.

CARLISLE,
PRINTED BY F. JOLLIE,
AND SOLD BY HIM, AND C. LAW, LONDON.

1795.

PREFERRATION

IN

FAVOUR

OF

FRANKLIN

TO THE

INHABITANTS

OF THE

COUNTY OF CUMBERLAND,

GENERALLY

(UNJUSTLY IT IS HOPED)

CHARACTERIZED AS LITIGIOUS,

THIS SMALL PAMPHLET,

TENDING TO PROMOTE THEIR INTEREST,

AND ALLAY THEIR PASSIONS,

IS AFFECTIONATELY INSCRIBED BY

THE AUTHOR.

THE ADVANTAGES OF *Settling Diſputes* BY ARBITRATION.

SECTION I.

THE CHIEF CAUSE OF LAW-SUITS.

IN a ſtate of ſociety, where property is divided, were all men upright and honeſt in their intentions, it may fairly be queſtioned, whether the imperfection of human judgment, ſo liable to be perverted by the ingenuity of ſelf-love, would not render law neceſſary, and cauſe ſome appeals to it?—Were we to ſuppoſe the contrary, we muſt admit as a conſequence, what, perhaps, ought not to be admitted, that an appeal to the law is never made, but where there exiſts diſhoneſt intention in one of the parties. Diſmiſſing, however, this queſtion, it will not be diſputed, whether the variety of law-ſuits, which daily happen, are not chiefly owing to diſhoneſt intention in ſome of the parties, or to an inflamed mind which ſeeks reſentment and revenge.

We are told from high authority, that the "beginning of ſtrife is like letting out water;" and we are adviſed "to leave off contention, before it be meddled with."

In the firſt opening of a diſpute, a man feels a little irritation, mixing with a ſenſe of intereſt; as

it is continued, intereſt is wholly loſt ſight of, and perſonal conſequence, and apprehended inſult, and indignity, mix with the queſtion in the mind, till the man ſeeks alone to humble his enemy, and ceaſes to regard the matter in debate in any other light. Law-ſuits, like wars, are often trifling and unimportant in their origin, but at length they involve the parties in abſolute ruin; the intereſt in queſtion is not only ſacrificed, but the whole fortune of the individuals engaged, depends upon the uncertain iſſue of a tedious litigation.

If, therefore, wars and fightings are declared to proceed from our improper and ungoverned appetites, to the ſame origin may be traced the greateſt number of thoſe law-ſuits, which are at once the curſe and the opprobrium of every neighbourhood.

He who ſeeks nothing but his right, who ſtudies not to impoſe, and who ſeeks not to revenge, can never object to ſuch a mode of deciſion, as is at once, cheap, ſpeedy, and effectual. If there be ſuch a mode of ſettling diſputes, it ſurely becomes the courts of law, or the jurors who decide on appeals to the law, to treat that man as of ſuſpicious character, who has refuſed to accede to ſuch a ſettlement, when propoſed by his more upright opponent.

SECT. II.

ON THE EVILS ATTENDING SUITS AT LAW.

ALTHOUGH what is hereafter advanced is applied to the law, as it now exiſts in this country; it is not intended to ſuggeſt, that there is any evil in the ſtructure of the laws of England, which are acknowledged to be equal to any in

Europe; the evils attending ſuits at law, may perhaps be abſolutely unavoidable, and may exiſt in every kingdom, where the laws have been long eſtabliſhed, and have become expenſive through their complexneſs and variety. The evils attending ſuits at law, conſiſt,—

1. In the expence.
2. The danger of a nonſuit by ſome error in proceſs, made by the attorney to whom the conduct of the cauſe muſt neceſſarily be committed; and which may end a trial, without the matter in queſtion ever coming to any hearing.
3. The want of local knowledge in the jurors, who are often, on this account, unable fairly to eſtimate the diſpute.
4. The want of a knowledge of the character of the witneſſes, in the jurors, who are to give a verdict according to their teſtimony.
5. The buſtle and hurry of an aſſize, which alike confound ſolicitor, counſel, and client; and the danger of ſome trifling incident preventing the challenge of a juror, or ſome other ſtep equally important to a fair and impartial deciſion.
6. The hazard of appealing to the wrong court, and the extreme delay of the court of Chancery.

1. The firſt evil we have mentioned is the *expence* of law-ſuits;—an evil which thoſe will readily acknowledge, whoſe misfortune or whoſe crime it has been to appeal often to the laws. A ſuit at common law, where the ſubject of contention is the moſt trifling, (and indeed the depending ſum, whether great or ſmall, makes no difference in the expence of the proceedings) will coſt the loſing party, if the witneſſes be numerous, from three to five hundred pounds, when brought to iſſue at a county

aſſize.——The fees, the expence of counſel and ſolicitor, vary not with the nature of the cauſe, or the local reſidence of the parties; but that is not the caſe with reſpect to the witneſſes, who are frequently in great numbers carried to the aſſize town, the diſtance perhaps of thirty or forty miles; not to mention the miſerable proviſion, of ſometimes trying cauſes in another county, a hundred miles from the reſidence of the parties, and their expenſive witneſſes. There was a cauſe lately tried in the county of Cumberland about a right, the value of which was not *five ſhillings;* the plaintiff, whoſe only object was revenge, loſt the cauſe, and incurred thereby a loſs in expences of *four hundred pounds:* the defendant being alſo obliged to pay off what are called *extras*, about fifty pounds. In this caſe, the hardſhip to be lamented was that of the defendant; but without going upon the merits of the cauſe, it clearly enough illuſtrates the *expence of legal proceedings.* A ſuit in Chancery, for a very ſmall object, frequently laſts ten or twelve years, ſometimes fifteen or twenty, and coſts from two hundred to five thouſand pounds.

2. The danger of a nonſuit, without hearing the merits of the caſe, is to be numbered amongſt the evils attending ſuits at law. No man, on account of the technicality of legal proceedings, can conduct his own ſuit; he muſt commit himſelf therefore to an attorney, who may be diſhoneſt, and betray him; or ignorant, and lead him to a nonſuit: the leaſt evil attending which, will be, that the party nonſuited will be obliged *to pay both his own and opponent's coſts;* and, if he chuſe to again commence another action, run the ſame *riſque*, and wait with anxiety the dreadful uncertainty of law. All this injury may come upon a man, without his

caſe ever being heard or judged of by a jury; and ſurely this ought not to be omitted in the calculation of probable events which may happen to him who has committed himſelf to the guidance of an attorney!

3. The want of local knowledge in jurors, is an evil of no ſmall magnitude attending appeals to the law. It is true, this evil is attempted to be remedied by admitting part of the jury, who are to try the iſſue, to *view* the matter in queſtion. This, however, is attended with an additional expence to the parties—and it is no ſufficient remedy for the evil. Suppoſing, for inſtance, the diſpute to be about the right to a water, or the evil ſuſtained by damage done by a watercourſe; if the jurors viewing the premiſes have no previous knowledge of the neighbourhood, their judgment will be much guided by the accidental circumſtance of the fair or rainy weather previous to their view.—Almoſt every matter requiring a jury of view, is ſubject to circumſtances leading to a ſimilar deception.

4. The want of a knowledge of the character of witneſſes, in the jurors, who are to give a verdict according to the teſtimony of ſuch witneſſes, is a very great evil attending ſuits at law. The baſeſt character is often the moſt ſpecious, and the moſt capable of telling the tale he has learned from the attorney. The moſt ſincere and honeſt man is often confounded by the appearance of the court, and the queſtions of the counſel. How then ſhall the jurors learn the truth? They are to go according to evidence; but ſurely not according to every thing a known bad man pleaſes to ſwear,—for were this the caſe, "the worſe would always appear to them to be the better cauſe." Suppoſing two oppoſing witneſſes ſwear in direct oppoſition to

each other—the one ſwears to the exiſtence of a certain circumſtance, and the other ſwears to the non-exiſtence of the ſame circumſtance—how are the jurors to decide according to this evidence before them? Only by determining which of the two witneſſes is more worthy of credit; and, without ſome knowledge of their character, this can only be done by appearances before them.—How vague and uncertain ſuch appearances!—It is admitted indeed, that evidence may be brought againſt the credibility of witneſſes; but the jury will be involved in the ſame difficulties reſpecting the credibility of the laſt evidence. In one word, nothing but a previous knowledge of the character of witneſſes is ſufficient, often, rightly to enable the jury to determine upon the credit of their teſtimony; and this can rarely be expected to exiſt, when no time is allowed for ſuch enquiries, but the ſame day is to determine *who ſhall be the jurors in a cauſe*, and on what ſide right is. There is no time for a juror to traverſe a neighbourhood, to enable him to eſtimate the character of a witneſs; and the circumſtance of living in the ſame county is by no means ſufficient; for the notoriety of the character of few witneſſes is ſuch, as that every juror muſt be acquainted with it.

5. The buſtle and hurry of an aſſize are evils attending ſuits at law, by which many have greatly ſuffered. The leading counſel knows nothing of the cauſe till he arrives at the aſſize town—he is confounded with the multitude of his cauſes, and ſeldom gets any difficult one well digeſted. The attorney, hurried by other buſineſs, is out of court when the cauſe comes on, and the jurors are ſworn, to whom he intended to have objected, before he gets knowledge of the cauſe being called for.—Some material witneſs is ill, and cannot attend in

court; if, therefore, the trial be put off, refreſhing fees are to be given to counſel, the ſolicitor paid for new journeys, the whole of the witneſſes to be again carried to the aſſize town! In the confuſion, ſome paper is miſlaid, and ſome material circumſtance is forgotten; and the laſt, but not leaſt important circumſtance to be mentioned, the judge, fatigued with the length of other trials, ſits with impatience, cuts ſhort the evidence, ſums up with haſte, and leads the jury to an erroneous deciſion: or, which often happens, leaves the town, and your cauſe ſtands over till another year; after you have kept your witneſſes four or five days at the aſſize town, at a very heavy expence, you are to travel once again the ſame road, and again incur the ſame charge!

6. The hazard of applying to the wrong court, and the extreme delay of the court of Chancery. Although it may not often happen, yet is it not without example, that a cauſe has come before a court ſitting at *niſi prius*, which has been diſmiſſed to the court of Chancery, as a matter not cognizable in the court to which the parties had made their firſt appeal. The delay of the court of Chancery is proverbial, and requires no enlargement; we have elſewhere ſaid, and we repeat it, a ſuit in this court often laſts ten or twelve years, and there have been thoſe which have been far longer depending.

I admire the general ſpirit of the laws of England, and whether they be capable of amendment, in the preſent ſtate of ſociety, I pretend not to ſay; perhaps no laws are in their operation free from the evils we have enumerated; perhaps they are owing, rather than to the forming of our laws, to the condition of man in ſociety.

SECT. III.

THE ADVANTAGES OF ARBITRATION.

THIS mode of ſettling diſputes is not liable to the evils which attend ſuits at law.

1. It is not expenſive.

2. No man can be nonſuited by any error of proceedings.

3. Arbitrators may always be found who poſſeſs ſufficient *local* knowledge; or, *not being confined to time*, they may obtain ſufficient local knowledge, and may view the thing in queſtion at all ſeaſons.

4. They can eaſily obtain a ſufficient knowledge of the character of witneſſes, as they may *take time* for that purpoſe. And if the witneſſes be numerous, to avoid expence, the arbitrators may go to them: this will ſave the expence of travel, &c.

5. No buſtle or hurry attend the deliberations of arbitrators.

6. They combine equally the advantages of a court of law and equity. If the law of the caſe be material, they have acceſs to all the legal opinion of the kingdom; and if they be required to correct the hard operation of ſome ſtatute, never intended to apply to the caſe in hand, they may exerciſe wiſdom, in an equitable deciſion. For this the court of Chancery is eſtabliſhed—Happy they who find a chancellor in an upright honeſt neighbour!

If it be objected that arbitrators cannot examine witneſſes upon oath,—it is replied, that their knowledge of each individual's character who comes before them more than compenſates this diſadvantage, if indeed it be a diſadvantage; for there is much truth in the obſervation, that a man

who will ſpeak falſely where an important matter is depending, will not ſcruple to ſanction his falſehood by an oath.

SECT. IV.

THE REASON WHY ARBITRATORS DO NOT GIVE SATISFACTION.

THE chief cauſe why arbitrators do not give ſatisfaction is, that each party having choſen one, expects that he is *for him* to play the advocate, rather than decide as an equitable and impartial judge. A jury, not being appointed by the parties, are not liable to the ſame imputations; for diſhoneſt friendſhip is not expected in thoſe with whom we are perhaps little acquainted.—— It is to be lamented, that too often ill-choſen characters as arbitrators do lean to the man who nominated them, to the *opprobrium* of the very name and office they ſuſtain. But this is the fault of the choice, not of this mode of ſettlement.— Was it never heard that ſome of a jury mixed perſonal prejudices with their deciſion?—If this be not probable, why the proviſion of a challenge?

Another reaſon why arbitrators do not always give content, may be found in the origin and deſign of law-ſuits. The parties rather ſeek, as we before obſerved, to ruin each other, than to obtain right. They are both offended that the diſpute has been ſettled with ſo trifling an injury to the enemy.— Were diſputants at all equitable in their deſires and motives, there would be little complaint of arbitrators. Beſides, the probability is, that more are diſſatisfied with the iſſue of a law-ſuit, than the end of an arbitration; but to whom, or of whom, muſt they complain?

SECT. V.

WHO SHOULD BE CHOSEN ARBITRATORS.

THREE qualifications ſeem neceſſary to the men who ſhall fill this office well, *underſtanding,—indepenaence,—and firmneſs of character.* Underſtanding is neceſſary to perceive and diſcriminate the right and the wrong—to detect the gloſſes of ſophiſtry, and the artifices of fraud.—Independence is neceſſary, to prevent the deciſion being influenced by a bribe; and perhaps more than all, firmneſs of character is neceſſary, to prevent the operation of the ſeduction of flattery, and the ſubtile influence of friendſhip. Moſt men are flattered by being choſen arbitrators; they, therefore, ſtrongly lean to the ſide of him who nominated them to the office. Many a man would ſhudder at the idea of a bribe, who yet may be influenced by flattery.—He alone is qualified to fill this office, and diſcharge the duty of it, who is *firm* and *inflexible*, who fears not to offend, where he muſt do it, in order to do juſtice. If theſe qualifications rarely occur in the ſame perſon, (which however I hope is not the fact) it is equally improbable that they ſhould be found in thoſe who ſerve on juries, as in thoſe who decide in arbitrations.

After all, as the imperfection of our nature cauſes diſputes, we are to expect that the ſame imperfection will render the ſettlement of them ſomewhat difficult, in every mode that can be adopted.

Happy ſhall we be, and happy ſhould we eſteem ourſelves, if we eſcape from the evils in which we may be involved, in that way which is attended with the leaſt danger!

FINIS.